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No. [illegible]

In the Supreme Court of the United States

October Term, [illegible]

[illegible] & Son Export Corporation and
[illegible] & Son, Inc., Petitioners

v.

Commissioner of Internal Revenue

On petition for a writ of certiorari to the
United States Court of Appeals for the
[illegible] Circuit

MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION

[illegible],
Solicitor General,
[illegible],
Assistant Attorney General,
[illegible],
[illegible],
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 790

D. LOVEMAN & SON EXPORT CORPORATION and
D. LOVEMAN & SON, INC., PETITIONERS.

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The taxpayers, which are engaged in the business of buying and reselling steel, used inventories in computing taxable income and valued their inventories at "cost or market, whichever is lower." See Section 22(c) of the Internal Revenue Code of 1939; Sections 29.22(c)-2 and 29.22(c)-4 of Treasury Regulations 111. During the taxable periods here involved (calendar years 1951 and 1952 and the fiscal year ending

August 31, 1953), because of shortages occasioned by the Korean conflict, taxpayers were unable to purchase steel from the major steel producers, their previous source of supply. Instead, they obtained their supplies from other mills at premium prices.[1] In valuing their closing inventories at the lower of "cost or market," taxpayers used the published prices of the major mills as the "market" price, rather than the higher prices of the mills that were then their sole source of supply, resulting in a reduction of their ending inventories and a corresponding diminution of their taxable incomes. The Commissioner determined that taxpayers were required to value their inventories with reference to the market in which they actually purchased their steel, not a theoretical market unavailable to them both at the time of purchase and at the time the inventories were taken. The Tax Court sustained his determination (R. 221a-227a), and the Court of Appeals affirmed (Pet. 12).

The decision below is in accord with the governing statutory provisions,[2] the applicable Treasury Regulations,[3] and recognized accounting principles and practice.[2] As the Tax Court pointed out in its carefully reasoned opinion, by valuing inventories on the basis of posted prices of the major mills during years in which they actually purchased from smaller mills at higher prices, taxpayers sought to apply artificial values to their inventories and thereby "provided for losses which were not in fact anticipated" (R. 225a). The taxpayers' "case falls far short of meeting the heavy burden of proving that the Commissioner's action [in revaluing the inventories] was plainly arbitrary" (*Lucas v. Structural Steel Co.*, 281 U.S. 264, 271), and the concurrent conclusion of both courts below as to the market value of taxpayers' inventories should not be disturbed (*Corn Products Co. v. Commissioner*, 350 U.S. 46, 51).

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[1] These same conditions, of course, enabled taxpayers to sell this steel at prices well above their actual cost.

[2] 1939 Code Section 22(c) permits the use of inventories by taxpayers "upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

[3] Section 29.22(c)-2 of Treasury Regulations 111 under the 1939 Code authorizes valuation of inventories on the basis of "cost or market, whichever is lower." Section 29.22(c)-1 of the Regulations provides that "market" ordi-

No conflict of decisions exists, or is even asserted. Nor is there any other occasion for further review. The portion of the President's Message on Taxation (April 20, 1961) quoted and relied upon by taxpayers (Pet. 7-8) serves only to confirm the correctness of the decision below, for it condemns the very

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narily means "the *current bid price* prevailing at the date of the inventory *for the particular merchandise* in the volume in which usually *purchased by the taxpayer*," i.e., the replacement cost of the purchased goods. (Italics added.) Corresponding sections of Regulations 118 under the 1939 Code are substantially the same.

[2] See Finney & Miller, *Principles of Accounting (Intermediate)* (5th ed. 1958), p. 251; Paton and Dixon, *Essentials of Accounting* (1958), p. 351; Accounting Research Bulletin No. 43, *Restatement and Revision of Accounting Research Bulletins Issued by Committee on Accounting Procedure* (1953), pp. 31-32.

type of "manipulation of inventories" which taxpayers here espouse—"the understating of the valuation of inventories."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1962.

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